

THE SCOPE OF STATE AND LOCAL GOVERNMENT ACTION IN ENVIRONMENTAL LAND USE REGULATION

After years of near-disastrous neglect and indifference, local,¹ state² and federal³ governmental entities are finally exhibiting concern with environmental preservation. Regulation of private land use is obviously a necessary adjunct to any effective legislative effort to preserve the environment. Many state and local governments have recognized this fact and have enacted regulatory legislation designed to curtail private landowner activities damaging to the environment. Typical of these programs are those of California⁴ and the town of

¹ Old Lyme, Conn., Zoning Regulations §§ 1.22.1, .2, 3.17, .18 (1968).

² Me. Rev. Stat. Ann. tit. 12, §§ 4701-09 (Supp. 1971); N.H. Rev. Stat. Ann. ch. 483: A (1968); R.I. Gen. Laws Ann. § 11-46, 1-1 (1969).

³ 42 U.S.C. §§ 4321 et seq. (1970). See Donovan, *The Federal Government and Environmental Control: Administrative Reform on the Executive Level*, 12 B.C. Ind. & Com. L. Rev. 541 (1971); Comment, *The Clean Air Amendments of 1970: Better Automotive Ideas from Congress*, 12 B.C. Ind. & Com. L. Rev. 571 (1971).

⁴ Cal. Gov't Code §§ 66600 et seq. (West 1966).

66601. *Filling of Bay.* The Legislature further finds and declares that the present uncoordinated, haphazard manner in which the San Francisco Bay is being filled threatens the bay itself and is therefore inimical to the welfare of both present and future residents of the area surrounding the bay . . . and that further piecemeal filling of the bay may place serious restrictions on navigation in the bay, may destroy the irreplaceable feeding and breeding grounds of fish and wildlife in the bay, may adversely affect the quality of bay waters and even the quality of air in the bay area, and would therefore be harmful to the needs of the present and future population of the bay region.

66610. *Definition; purpose and applicability.* For the purposes of this title, the San Francisco Bay includes the shoals outside the Golden Gate and the water areas from the south end of the bay to the Golden Gate and to the Sacramento River line . . . and, specifically, the marshlands (land lying between mean high tide and five feet above mean sea level); tidelands (land lying between mean high tide and mean low tide); and submerged lands (lands lying below mean low tide), but excluding from the marshlands, tidelands and submerged lands those lands which are not subject to tidal action. . . .

66632. *Interim provision for permits; "fill" and "materials" defined; permits already issued.*

(a) [A]ny person or governmental agency wishing to place fill in the bay or to extract submerged materials from the bay shall secure a permit from the commission. . . .

(b) Whenever a permit is required by a city or county an applicant for a permit shall file an application with the city council of the city . . . or the board of supervisors of the county. . . .

Whenever a permit is not required by a city or county, application for a permit shall be made directly to the commission.

(c) Upon receipt of the report from the city council or the board of supervisors . . . or upon receipt of an application for a permit made directly to it, the commission shall hold a public hearing or hearings as to the proposed project and conduct such further investigation as it deems necessary. . . .

(d) The commission shall take action upon the application for the permit, either denying or granting the permit, within 60 days after it receives the report. . . . A permit may be granted for a project if the project is either (1) necessary to the health, safety or welfare of the public in the entire bay area, or (2)

Old Lyme, Connecticut.⁵ In California, the McAteer-Petris Act⁶ created the San Francisco Bay Conservation and Development Commission (BCDC) to control development around San Francisco Bay. Recognizing that the ecological balance of the bay was threatened by the haphazard filling activities of private land developers,⁷ the legislature empowered the BCDC to issue or deny permits for any proposed filling projects in the bay.⁸ The Old Lyme, Connecticut, regulations are also aimed at preserving tidal marshlands. In 1968, the Old Lyme Zoning Commission held hearings to consider amending the existing zoning ordinance governing marshlands.⁹ Observing that environmental

of such a nature that it will not adversely affect the comprehensive plan being prepared. . . .

⁵ Old Lyme, Conn., Zoning Regulations §§ 1.22.1, .2, 3.17, .18 (1968).

1.22.1 Tidal Wetlands: Tidal Wetlands are those lands which (1) border on or lie beneath tidal waters, and (2) are less than 3.5 elevation. . . .

1.22.2 Tidal Marshlands: Tidal Marshlands are tidal wetlands which are not beach areas or rocky shore areas, and are switch grass, black grass, saltmeadow grass, saltmarsh grass, salt grass, and common reed grass.

3.17 Restrictions On The Use of Tidal Wetlands: No construction, reconstruction or alterations of any building or structure and no filling in, dumping, discharge of sewerage, or other wastes, piping, excavation, or change of grade is permitted in any tidal wetlands excepting wooden walkways, warfs [sic] and duck blinds, public boat landings and ditches opened or kept open by the State or Town.

Applications for special exceptions from said restrictions may be submitted to the Zoning Board of Appeals, and the Zoning Board of Appeals is hereby authorized, after public hearing held upon any such application, to grant a special permit for any of the following:

(a) the digging or dredging of a channel by a landowner to allow his boat to be brought from his land to the water, said channel to be only wide enough and deep enough to accommodate the boat of the applicant;

(b) the placing of a boathouse on pilings—the boathouse to be only large enough to accommodate the boat of the land owner;

(c) the erection of piers, docks, piles for life lines, rafts, or jetties, and the filling in with sand and the digging of channels at beaches or rocky shore areas. . . .

3.18 Restrictions On The Use Of Land Adjoining Tidal Marshlands: No grading, construction or alteration is permitted within a land buffer zone twenty-five (25) feet wide adjoining tidal marshlands until there is first submitted to the Building Inspector a plan of construction, or a plan of grading showing the details of the proposed construction, excavation, or grading. No permit for such operations shall be granted unless the plan shall clearly show that the results of the proposed construction, excavation or grading will not cause any filling in of the tidal marshlands. . . .

⁶ Cal. Gov't Code §§ 66600 et seq. (West 1965).

⁷ Id. § 66601.

⁸ Id. § 66604.

⁹ "No land in any district which is less than one foot above mean high water shall be used for construction, nor shall it be filled or paved, nor shall any natural grades be changed, nor any water course altered or obstructed, except with the approval of the Zoning Commission, which Commission shall have found after a public hearing on the subject, that any proposed operation will not cause any hazard from flooding, will not adversely affect drainage or ground water level, and will not be detrimental to property values or the public health, safety, and welfare." Old Lyme, Conn., Zoning Regulations § 3.16.4 (repealed 1965).

needs required more definitive measures, the Commission adopted regulations prohibiting filling, dredging and other similarly harmful activities. Applications for special exceptions had to be approved by the town Zoning Board of Appeals.¹⁰

In two recent cases, *Candlestick Properties, Inc. v. San Francisco Bay Conservation and Developmental Commission*,¹¹ and *Bartlett v. Zoning Commission*,¹² private landowners challenged the constitutionality of these regulations on the grounds that they were so restrictive that they rendered the owners' lands commercially valueless. Such regulations, the landowners argued, were an unreasonable and arbitrary exercise of police power and constituted a taking without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

Despite the factual similarities of the two cases, the courts reached opposite conclusions. In *Candlestick*, the appellant, Candlestick Properties, Inc., owned a parcel of bayside land which was submerged at high tide. This land had been acquired in 1964 as a place for the deposit of fill and for ultimate development. Appellant applied to the BCDC for a permit to fill a portion of this land with fill from construction projects. When the permit was denied, Candlestick Properties, Inc., filed an action in the San Francisco Superior Court seeking a review of the Board's decision and a writ of mandate to compel approval. In the alternative, plaintiff sought damages for the alleged taking of its property without compensation. The petition for a writ of mandate was denied and a demurrer to the damage claim was sustained.

On appeal, the California Court of Appeals held that such land regulation was properly within the police power of the state.¹³ The court reasoned that the police power is an "indispensable prerogative of sovereignty" for promotion of the health, safety, morals or general welfare of the public.¹⁴ According to this holding, the only limitation on the police power is that it not be unreasonably or arbitrarily invoked. The court indicated that the necessity and form of police power regulation are for legislative determination. Therefore, the only question for the court to review was whether there was any reasonable basis of support for the legislation. On examining the legislative determination according to these standards, the court found that the McAteer-Petris Act clearly defined the public interest in the environmental protection of San Francisco Bay.¹⁵ It was evident to the court that haphazard and uncontrolled filling of bay marshlands would upset the ecological balance of the bay area and would therefore be inimical to the welfare of present and future bay area residents. Thus the court

¹⁰ Old Lyme, Conn., Zoning Regulations § 3.17 (1968).

¹¹ 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970).

¹² — Conn. —, 2 E.R.C. 1684 (1971).

¹³ 11 Cal. App. 3d at 572, 89 Cal. Rptr. at 906.

¹⁴ Id. at 570, 89 Cal. Rptr. at 905.

¹⁵ Id. at 571, 89 Cal. Rptr. at 905.

found that there was a rational basis for creation of the BCDC with the power to regulate filling activities. Noting that the restrictions were not unduly harsh but were in fact necessary for the public welfare,¹⁶ the court ruled that the zoning regulations were a proper use of the police power, and that appellant was not entitled to damages.¹⁷

In *Bartlett*, the plaintiff, a private landowner, had acquired land which he desired to fill. When the new zoning ordinances forbidding all filling activities were passed,¹⁸ he filed suit in the Connecticut Court of Common Pleas for relief from the town Zoning Commission's amendment of the regulations, claiming that these measures were a confiscation of his land without just compensation. Both the trial court and the Connecticut Supreme Court held that the zoning regulations amounted to a taking of plaintiff's property in violation of his constitutional rights. The higher court acknowledged that preservation of the environment with its ecological, healthful, aesthetic and economic benefits was a laudable objective for the ordinances, but noted that the objective itself was not in issue.¹⁹

The important question, as the state Supreme Court saw it, was whether this objective could be accomplished in such a manner. Since these regulations left the landowner with no reasonable commercial use for his property, the court concluded that the land was rendered practically worthless.²⁰ The court also noted that although the state legislature had recognized the importance of environmental preservation, the latter had made no provision for reasonable compensation in cases where takings were necessary.²¹ The court therefore concluded that the extreme restrictions of the Old Lyme, Connecticut, zoning regulations were an unreasonable and arbitrary exercise of police power, and thus were confiscatory and unconstitutional.²²

The common question in these two cases is whether land use restrictions for the purpose of environmental preservation are a proper exercise of a government's police power, or whether they constitute a confiscatory taking of property without just compensation. Although governmental efforts at maintaining the quality of the environment will, of necessity, embody significant land use regulation, it is essential to the success of these efforts that clear constitutional guidelines be

¹⁶ *Id.* at 572, 89 Cal. Rptr. at 906.

¹⁷ It is worthwhile noting that the McAteer-Petris Act to save San Francisco Bay has been hailed as a milestone in environmental legislation. See Note, Saving San Francisco Bay: A Case Study in Environmental Legislation, 23 Stan. L. Rev. 349, 350 (1971). Intense public pressure from private citizens and conservation groups resulted in the bill's enactment, after opposition from lobby groups had stalled it in the initial stages. The pressure techniques used have been held out as a model for future action by conservationists. *Id.* at 365 n.44. A judicial imprimatur on such legislation, as occurred in *Candlestick*, will encourage more public efforts to obtain such measures.

¹⁸ Old Lyme, Conn., Zoning Regulations §§ 1.22.1, .2, 3.17, .18 (1968).

¹⁹ — Conn. at —, 2 E.R.C. at 1686.

²⁰ *Id.*

²¹ *Id.*

²² — Conn. at —, 2 E.R.C. at 1687.

developed and followed by the legislatures and courts. This comment will examine the broad question of the state's role in environmental protection. Specifically, it will explore the rationales adopted by the courts to support their acceptance of the police power as a proper tool in environmental land use control. These rationales will then be considered in light of the Fifth and Fourteenth Amendments to the Constitution. Finally, the respective roles of courts and legislatures will be analyzed in an attempt to define the scope of government action in environmental land use control.

I. JUDICIAL RATIONALES FOR UPHOLDING ENVIRONMENTAL LAND USE REGULATION AS A VALID EXERCISE OF THE POLICE POWER

The police power is generally defined as the power inherent in the state to prescribe regulations to promote the health, morals, safety and welfare of the public.²³ The determination of what is necessary to promote these goals is a legislative function.²⁴ The legislatures' concept of the proper scope of this function has been constantly changing in order to keep pace with the changing values, mores and priorities of society. While courts have placed certain constitutional limitations on the police power,²⁵ the United States Supreme Court has stated that a precise judicial definition of the outer limits of this power is an impossible task.²⁶

In the period after the Industrial Revolution, until the 1920's, the courts were zealous in striking down any state regulation determined to be violative of individual property rights.²⁷ The courts eventually

²³ See, e.g., *Berman v. Parker*, 348 U.S. 26, 32 (1954).

²⁴ *Id.*

²⁵ A state's exclusion of people from state employment solely on the basis of their membership in an allegedly subversive organization, without regard to knowledge of organization activities, in order to preserve public security, violated the due process requirement of the Fourteenth Amendment. *Wieman v. Updegraff*, 344 U.S. 183, 190-91 (1952). A statute calling for sterilization of certain criminals was held to be an invalid exercise of the police power because it classified crimes arbitrarily, thus violating the equal protection clause of the Fourteenth Amendment. *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942). Exercise of police power to restrict business activities when no legitimate public interest demanded it was held a denial of due process. *Panhandle E. Pipe Line Co. v. State Highway Comm'n*, 294 U.S. 613 (1935); *Hertz Drivervself Stations, Inc. v. Siggins*, 359 Pa. 25, 44-46, 58 A.2d 464, 474-75 (1948).

²⁶ *Berman v. Parker*, 348 U.S. 26, 32 (1954).

²⁷ In this period, the Supreme Court applied the substantive rights interpretation of the due process clause of the Fourteenth Amendment to economic freedom. In essence, the Court was upholding the "laissez-faire" economic policy of the 19th century and frowned upon any unnecessary government interference with private enterprise. State social regulation to enhance the living condition of the community was viewed as unnecessary intermeddling by the state government. See, e.g., *Adkins v. Children's Hosp. of the District of Columbia*, 261 U.S. 525, 554-56 (1923); *Adams v. Tanner*, 244 U.S. 590, 594-95 (1917); *Lochner v. New York*, 198 U.S. 45, 60-63 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578, 588-91 (1897). Cf. *Ferguson v. Skrupa*, 372 U.S. 726, 728-29 (1963). See Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 Harv. L. Rev. 353 (1916).

abandoned this economic laissez-faire attitude,²⁸ and gradually expanded the police power—with a consequent diminution of concern for private property. In *Euclid v. Ambler Realty Co.*,²⁹ the United States Supreme Court upheld a restrictive zoning ordinance aimed at fire prevention and the alleviation of overcrowded urban conditions, even though the regulation decreased the commercial value of appellant's property by seventy-five percent. Originally, zoning ordinances were thought to be outside the range of police power. Since they were considered to be based on aesthetic reasons only, it was held that they could be enforced only through eminent domain.³⁰ The Court in *Euclid*, however, held that the particular zoning regulation in question promoted the health and welfare of the public and was therefore a proper exercise of police power. The Court stated that the Constitution must have a certain degree of flexibility in order to meet the changing demands and priorities of society:

[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.³¹

Following *Euclid*, conflicts between the public interest and individual property rights resulted in the substantial curtailment of incidents of private property under the exercise of police power. Some aspects of public welfare promoted by the exercise of police power were oil conservation,³² dust and noise abatement,³³ price stability of agricultural products,³⁴ flood protection,³⁵ and open space and water conservation.³⁶ With the increasing enactment of environmental legis-

²⁸ The Supreme Court emphasized that social and economic regulations in the public interest are matters for elected legislators to determine. Courts should not intrude into this area by substituting the private economic beliefs of judges in overruling legislative determinations. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 729-30 (1963); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398 (1937); *Nebbia v. New York*, 291 U.S. 502, 537-38 (1934); *Miller v. Schoene*, 276 U.S. 272, 279 (1928).

²⁹ 272 U.S. 365 (1926).

³⁰ See, e.g., *Marblehead Land Co. v. Los Angeles*, 36 F.2d 242, 243 (S.D. Cal. 1929).

³¹ *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

³² *Patterson v. Stanolind Oil & Gas Co.*, 182 Okla. 155, 77 P.2d 83 (1938). The number of oil wells on appellant's property was limited, thereby depriving him of substantial income from the wells not allowed to be drilled.

³³ *Consolidated Rock Products Co. v. Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, appeal dismissed, 371 U.S. 36 (1962). Appellants were prohibited from conducting rock, sand and gravel operations on their land, thus leaving the land with no appreciable economic value.

³⁴ *Swisher v. Brown*, 157 Colo. 378, 402 P.2d 621 (1965). Appellant was required to destroy a substantial part of his lettuce crop, in which he had invested considerable funds and labor.

³⁵ *Iowa Natural Resources Council v. Van Zee*, 261 Iowa 1287, 158 N.W.2d 111 (1968). Landowners in this case were enjoined from constructing levees on and cutting channels through flood-susceptible land.

³⁶ *Norbeck Village Joint Venture v. Montgomery County Council*, 254 Md. 59, 254

lation, there has been a definite movement in the courts toward classifying environmental protection as a proper objective for the exercise of police power.⁸⁷ The *Candlestick* decision is a step forward in the trend of recent judicial recognition that individual property rights, including real property rights, should not be used by courts as an obstacle to environmental legislation.⁸⁸ Advocates of the *Candlestick* perspective can point to several rationales which courts have used to restrict the private use of property.

A. *The Balance-of-Interests Test*

The laws of nuisance and the recognized public interest in water and airways provide a sound basis for judicial support of environ-

A.2d 700 (1969). Appellant's property was deprived of all reasonable use because housing development plans were forbidden in order to preserve watershed and open spaces areas, and to prevent "urban sprawl."

⁸⁷ It has been held a valid exercise of the police power for a state, within its territorial limits, to prohibit the sale of certain products made from endangered species of animals outside the state, including those from foreign countries. *A.E. Nettleton Co. v. Diamond*, 27 N.Y.2d 182, 193-94, 264 N.E.2d 118, 123-24, 315 N.Y.S.2d 625, 632-33 (1970), appeal dismissed sub nom., *Reptile Products Ass'n v. Diamond*, 401 U.S. 969, 91 S. Ct. 1201 (1971). The rationale of the court was that the endangered species were related to the world environment, which in turn affected the welfare of the citizens of the state. See *Adams v. Shannon*, 7 Cal. App. 3d 427, 432, 86 Cal. Rptr. 641, 644 (1970); Comment, *Constitutional Problems in Environmental Legislation—The Mason Law*, 12 B.C. Ind. & Com. L. Rev. 657 (1971). See generally *Palladio, Inc. v. Diamond*, 321 F. Supp. 630 (S.D.N.Y. 1970), aff'd, 440 F.2d 1319 (2d Cir. 1971).

⁸⁸ Environmental problems and solutions are new to the legislatures and courts. Historically, American land policy has not considered environmental needs. As Representative Paul N. McCloskey has observed, since colonial times the American land and tax system has encouraged the *development* of land. McCloskey, *Preservation of America's Open Space: Proposal for a National Land Use Commission*, 68 Mich. L. Rev. 1167 (1970). The Northwest Ordinance of 1787 commenced the emphasis on development for American land use policy. For the next 183 years, that frontier expansion program left its mark on American institutions. Another factor encouraging development was the local property tax system, the primary source of funds for local governments. This system led to assessment of property on the basis of its "highest and best use," usually industrial and commercial development. *Id.* at 1170. If such land is owned by farmers or is lying open, the landowners generally cannot afford the taxes. As a result they sell to individuals who can afford the taxes, specifically industrial and commercial developers. Modern times have made increasing demands on local government revenues; hence more and more commercial development, which results in the present "urban sprawl." *Id.* Courts have also contributed to this developmental policy by adherence to such principles as that an individual may use his property as he chooses, so long as this use does not constitute a nuisance to others. *Id.* at 1169.

In the 1970's, *conservation*, rather than development, has become the top priority in land policy. *Id.* at 1167. Legislators have begun to recognize this on local, state and federal levels. See Old Lyme, Conn., Zoning Regulations §§ 1.2.2.1, .2, 3.1.7, .18 (1968); Me. Rev. Stat. Ann. title 12 §§ 4701-09 (Supp. 1971); 42 U.S.C. § 4321 et seq. (1970); Jackson, *Foreword: Environmental Quality*, the Courts, and the Congress, 68 Mich. L. Rev. 1073 (1970). But the overall land use and property tax system is not in accord with public goals. An environmental approach to land use regulation meets stiff resistance because such an approach is inconsistent with traditional institutions and concepts. Any effective land use policy would logically have to encompass all land, regardless of ownership, and here the problem of individual property rights arises.

mental protection.⁴⁰ As early as 1915, the Supreme Court upheld a city ordinance which prohibited appellants from operating a brickyard.⁴⁰ The decision diminished the value of the land, suitable only for brickmaking operations, by over ninety percent and in fact put appellants out of business. The Court found that the brickmaking activities were dangerous to the health of the public because of the fumes and soot which emanated from the brick ovens. Under these circumstances, depriving appellants of their property was considered a proper exercise of the police power, without need for compensation. The Court reasoned that to rule otherwise would be to sentence surrounding residents to permanent misery, without any hope for relief, all in the name of individual property rights:

It [the police power] may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not asserted arbitrarily. . . . To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community.⁴¹

The Court in effect balanced the interests of the public welfare and individual property rights; since the public welfare clearly outweighed the property rights, the latter had to yield.

This balance-of-interests test for land use zoning has also been applied in the area of flood plain regulation. In *Iowa Natural Resources Council v. Van Zee*,⁴² the Iowa Supreme Court stated that if legislation regulating use of property is to be a lawful exercise of police power, the public benefit derived from the regulation must outweigh the restraint on private property.⁴³ Clearly, in the case of flood plain zoning, the use of police power is justified because the harm that results to the public from flooding certainly outweighs the restrictions on individual property rights.⁴⁴

An interesting slant to the balance-of-interests test was provided by the Second Circuit in *Scenic Hudson Preservation Conference v. FPC*.⁴⁵ This action was brought by private conservation organizations and local municipalities to set aside the Federal Power Commission's granting of a license to construct a hydroelectric project on the Hudson River. The court set aside the FPC's action because of the latter's

⁴⁰ Cf. 6A American Law of Property §§ 28.23, 28.55, 28.59 (A.J. Casner ed. 1954).

⁴⁰ *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

⁴¹ *Id.* at 410.

⁴² 261 Iowa 1287, 158 N.W.2d 111 (1968).

⁴³ *Id.* at 1294, 158 N.W.2d at 116.

⁴⁴ Since 1928, over four billion dollars have been spent on flood control and disaster relief. This amount does not include billions of dollars in property damage, not to mention the loss of life and injury toll. See Dunham, *Flood Control Via the Police Power*, 107 U. Pa. L. Rev. 1098, 1100 (1959).

⁴⁵ 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

failure to make a thorough study of alternatives in light of environmental preservation. The court in effect acted as a "watchdog" over an administrative agency to make sure that the agency balanced competing interests in making its decisions.

Scenic Hudson suggests that environmental cases involving a clash of public interest and individual property rights are resolvable by the balance-of-interests procedure. Applying this test to *Candlestick*, it appears that the benefit to the public from land fill restrictions in the San Francisco Bay area far outweighed the harm done to appellant's individual rights. Conversely, appellant's potential benefit from filling his land and building on it was miniscule when compared with the harm that would be caused by the ecological ruination of bay marshlands.⁴⁶ If the balance-of-interests test had been used in *Bartlett*, a different result would have obtained. The court specifically noted the great economic, healthful, recreational and aesthetic benefits which marshland preservation would provide. Yet it based its decision on the deprivation of individual rights, with no consideration of a balance of interests.

The balance-of-interests test provides a manageable and familiar standard against which the courts can judge the propriety of using the police power as a means of environmental land control. As stated by the United States Supreme Court:

And where the public interest is involved, preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.⁴⁷

B. *The Role-of-Government Approach*

One commentator, noting the long history of confusion in the courts' attempts to distinguish between police power and eminent domain, suggests that the courts should abandon the *quantitative* "diminution of value" theory, which attempts to determine constitutionality by the amount a particular property value is diminished, and instead adopt a *qualitative* approach. This approach distinguishes the government's roles as *enterpriser* and *mediator*.⁴⁸ In its *enterprise* function, government restricts or takes land to enhance its own material resource plant—e.g., by building highways to facilitate commerce. This type of land control requires compensation because the harm to an individual's property rights occurs only for the government's material benefit. On the other hand, as a *mediator*, the government balances conflicting values of society and comes up with a solution in the form of legislation. When the government determines that

⁴⁶ See Cal. Gov't Code § 66601 (West 1965).

⁴⁷ *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928).

⁴⁸ Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 61-62 (1964).

land use must be restricted to promote one set of societal values over another, no compensation should be granted.

This qualitative role-of-government analysis, based on government function, lends itself to environmental matters. It can be argued that individual property rights in *Candlestick* and *Bartlett* were restricted because the legislature "mediated" the conflicting values of individual property rights and environmental preservation. In this mediation, the legislature favored environmental considerations. Thus, although there may be a decrease in land value, the landowner should not be compensated because the government does not act to increase its own material position at the expense of an individual; rather, it acts to promote what it determines to be the higher goal in a hierarchy of social values.

The court in *Candlestick* appears to have used this theory. In its determination that the necessity for and the form of zoning regulations were legislative functions, the court stated that even if it determined that the reasonableness of the legislative decision was debatable, the court should not interfere.⁴⁹ The court, in effect, recognized the mediative role of the legislature and demonstrated its hesitancy to interfere in this area. In *Bartlett*, on the other hand, the court did not consider the role-of-government approach. By looking to the amount of value the property had been diminished, the court appeared to use a quantitative approach. The role-of-government approach, by avoiding this purely quantitative diminution test, would have led the *Bartlett* court to uphold the zoning regulations.

C. The Public Trust Doctrine

Another rationale available to the courts to support police power regulation in environmental matters is the public trust doctrine.⁵⁰ The idea of a public right in certain lands, particularly those adjacent to water, had its origins in western civilization long before the signing of the Magna Carta.⁵¹ Under this theory, government is considered a trustee in holding public lands. In the United States, this has been true of tidelands, marshlands and estuarine areas. The Supreme Court has noted that the states hold those lands "below the high water mark" in trust for the public.⁵² Analogizing to property law concepts, the argu-

⁴⁹ 11 Cal. App. 3d at 571, 89 Cal. Rptr. at 905.

⁵⁰ The idea of a public trust in certain lands has its historical origin in Roman and English law. A public use was vested in certain areas such as seashores, highways and running waters; these interests were regarded inalienable by the sovereign. See Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 475-78 (1970).

⁵¹ In England, as early as the 14th Century, the Crown could prosecute persons who interfered with the public rights to flowing waters. Clause 33 of the Magna Carta specifically mentions public rights on streams throughout England. See Stone, 1 *Waters and Water Rights* 181 (R. Clark ed. 1967).

⁵² *Shively v. Bowlby*, 152 U.S. 1, 26-28 (1894); See 3 *American Law of Property* § 12.32 (A.J. Casner ed. 1952).

ment in favor of regulation by police power would contend that since this land is trust property, it should be held available for the uses for which the trust was established—the service of the people.⁵³ The public interest cannot be alienated in fee to private individuals; the public trust remains impressed on the land, and any conveyance by the state is subject to the right of the public since a grantor cannot convey a greater interest to the grantee than the grantor himself holds.⁵⁴ Such grants are therefore always encumbered by the public trust.⁵⁵ While grants of public trust lands are permitted subject to the public encumbrance, the state cannot relinquish its governing authority in such conveyances.⁵⁶

Since it holds tidelands and marshlands in public trust, the state has certain implied powers as trustee. These powers include everything necessary to the carrying out of the trustee function.⁵⁷ Although the purpose of holding wetlands in public trust has traditionally been delineated in terms of navigation, commerce, and fisheries,⁵⁸ one writer has suggested extending the public trust doctrine into environmental affairs.⁵⁹ At the very least, the state could justify regulation of tidelands to preserve environmental quality in terms of its effect on the fishing industry.⁶⁰ Neither *Candlestick* nor *Bartlett* alluded to the

⁵³ *Hayes v. Bowman*, 91 So. 2d 795, 799 (Fla. 1957).

⁵⁴ *Stone*, 1 *Waters and Water Rights* 196-97 (R. Clark ed. 1967).

⁵⁵ See, e.g., *People v. California Fish Co.*, 166 Cal. 576, 584, 138 P. 79, 82 (1913).

⁵⁶ In 1869, the Illinois legislature had granted to the Illinois Railroad more than a thousand acres of submerged lakefront land along the business district of Chicago. The legislature repealed this grant in 1873 in order to facilitate harbor control. The Supreme Court upheld the repeal of this grant since such a conveyance of public trust lands was beyond the power of the legislature in the first place. *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 455-56 (1892).

Another case in this area concerned a situation where the Massachusetts legislature created the Greylock Reservation Commission to preserve Mount Greylock as a natural woodland area. In 1953, the legislature created an administrative authority to construct a tramway and ski facilities on Mount Greylock, and directed the Greylock Commission to lease a portion of the woodlands to the authority. The administrative authority lacked funds and invited a private corporation to underwrite the project. Private citizens brought suit as representatives of the public trust to invalidate the whole transaction involving the two administrative bodies and the private corporation. The Massachusetts Supreme Judicial Court held that both administrative agencies had overstepped their express authority in managing public trust lands by permitting their use for a private commercial venture. *Gould v. Greylock Reservation Comm'n*, 350 Mass. 410, 426-27, 215 N.E.2d 114, 126 (1966).

⁵⁷ See, e.g., *Long Beach v. Mansell*, 3 Cal. 3d 462, 482, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1970).

⁵⁸ *Id.*

⁵⁹ The public trust doctrine has traditionally been applied with narrow scope. It has included only areas such as seashores, streams and parklands. However, public trust problems arise whenever environmental public interests need protection against individuals and groups. Therefore, judicial application of the doctrine would seem to be appropriate in most environmental situations. Sax, *supra* note 50, at 556-57.

⁶⁰ It is estimated that two-thirds of all coastal sport fish are estuary-dependent during part of their lives. Hearings on Estuarine Areas Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 90th

public trust doctrine, even though it is an applicable ground for decision in cases involving marshland areas. It is submitted that this doctrine would have provided a firmer legal foundation for the *Candlestick* decision, and would likely have produced a different result in *Bartlett*.

II. THE SCOPE OF GOVERNMENT ACTION IN LAND USE REGULATION

A. Constitutional Considerations

*In this conflict between the ecological and the Constitutional, it is plain that neither is to be consumed by the other.*⁶¹

The impassioned pleas of environmentalists concerning the precarious environmental situation cannot be allowed to obscure the Sixth Amendment's command that the Constitution is the supreme law of the land.⁶² The Fifth and Fourteenth Amendments ordinarily preclude the states from taking private property for public use without just compensation.⁶³ Although all property held by private individuals is subject to the police power of the state, the state's power to regulate is not unlimited. The regulation must bear a rational relation to subjects which fall within the police power.⁶⁴ In *Pennsylvania Coal Co. v. Mahon*,⁶⁵ Mr. Justice Holmes stated that while property use may be limited to an extent, if this regulation goes so far as practically to extinguish all property rights, the regulation is no longer rationally related to the subject of the police power. At this point, regulation may be exercised only through eminent domain. A laudable public purpose cannot cure unconstitutionality:

We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.⁶⁶

Just where the line between regulation of property through the police power, on the one hand, and eminent domain, on the other, must be drawn is a question not easily answered. Each case must be considered on its own particular facts. One case has held that a seventy percent decrease in property value was excessive and unreasonable.⁶⁷

Cong., 1st Sess., ser. 90-3 at 29 (1967) [hereinafter cited as Hearings]. See generally, I U.S. Commission on Marine Science, Panel Reports ch. I at 28 (1969).

⁶¹ *Commissioner of Natural Resources v. S. Volpe & Co.*, 349 Mass. 104, 111, 206 N.E.2d 666, 671 (1965).

⁶² U.S. Const. art. VI.

⁶³ See, e.g., *Panhandle E. Pipe Line Co. v. State Highway Comm'n*, 294 U.S. 613, 618 (1935).

⁶⁴ See, e.g., *Dooley v. Town Plan & Zoning Comm'n*, 151 Conn. 304, 308, 197 A.2d 770, 772 (1964).

⁶⁵ 260 U.S. 393 (1922).

⁶⁶ *Id.* at 416.

⁶⁷ *Dooley v. Town Plan & Zoning Comm'n*, 151 Conn. 304, 310-12, 197 A.2d 770, 773-74 (1964).

Certainly, most courts agree that where the *total* value of the property is destroyed, the owner must be compensated.⁶⁸ This view has been extended specifically to marshland zoning regulations similar to those in *Candlestick* and *Bartlett*.⁶⁹ Thus, whenever the courts have determined that the legislature has taken too much in its exercise of police power, the restrictions have been struck down as excessive and unreasonable.

Candlestick appears to be an anomaly in this area, but on close analysis, the decision is not irreconcilable with the *Bartlett* viewpoint. The appellant in *Candlestick* introduced no evidence to show that his land had no reasonable alternative commercial uses. The exact extent of the deprivation of land value was not determined. The Old Lyme, Connecticut, zoning regulations specifically enumerated the uses to which marshland areas could be put—e.g., duck blinds, boat landings and boat houses.⁷⁰ It was clear from these limitations that no reasonable commercial profit could be realized from the uses. The McAteer-Petris Act was not so specific as to how the land could be used. It simply forbade filling. In *Candlestick*, the court noted that the zoning regulations of the McAteer-Petris Act "are designed to preserve the existing character of the bay while it is determined how the bay should be developed in the future."⁷¹ The court determined that the regulations left room for alternative commercial development which would not harm the environment.

The court in *Candlestick* has been criticized for evading a constitutional discussion of the police power.⁷² This criticism is overly harsh. The court simply had no necessity to make such a constitutional determination. Without clear evidence as to the diminution of the value of plaintiff's property, the court had no reason to overrule the

⁶⁸ See, e.g., *East Coast Lumber Terminal, Inc. v. Babylon*, 174 F.2d 106, 110 (2d Cir. 1949); *Morris County Land Improvement Co. v. Parsippany-Troy Hills*, 40 N.J. 539, 557, 193 A.2d 232, 242 (1963); *Arverne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938); *Phoenix v. Burke*, 9 Ariz. App. 395, 452 P.2d 722, 723 (1969). See Becker, *The Police Power and Minimum Lot Size Zoning*, Pt. I: A Method of Analysis, 1969 Wash. U.L.Q. 263, 272-77.

⁶⁹ The Massachusetts Supreme Judicial Court has stated that there is definitely a public purpose behind environmental zoning regulations limiting filling activities in marshlands. *Commissioner of Natural Resources v. S. Volpe & Co.*, 349 Mass. 104, 111, 206 N.E.2d 666, 671 (1965). The court noted, however, that conservation is not a blank check to taking: "An unrecognized taking in the guise of regulation is worse than confiscation." *Id.* at 110-11, N.E.2d at 671. Thus when such regulations go too far in restricting property value, eminent domain is called for. A Maine case also involved a question of the constitutionality of marshland zoning regulations for conservation purposes. The court decided that conditions so burdensome may be put on the use of the land by zoning regulation that there is the equivalent of an outright taking although title to the property and some vestiges of ownership remain. *State v. Johnson*, 265 A.2d 711, 715 (Me. 1970).

⁷⁰ *Old Lyme, Conn., Zoning Regulations* § 3.17 (1968).

⁷¹ 11 Cal. App. 3d at 572, 89 Cal. Rptr. at 906.

⁷² Note, *Coastal Zone Management—The Tidelands: Legislative Apathy vs. Judicial Concern*, 8 San Diego L. Rev. 695, 710 (1971).

legislation. If the *Candlestick* decision is limited to its facts, it is not irreconcilable with traditional constitutional considerations in the determination of whether a certain land use regulation goes too far. As Mr. Justice Brandeis once noted, where the constitutional question need not be determined, the legislation will not be overturned on constitutional grounds.⁷³

Another constitutional aspect that must be considered is that an individual should not be required to pay more than his fair share of governmental burdens. If something more or different is required of him than of the rest of the members of society, he should be accorded fair compensation.⁷⁴ One of the historical reasons for holding land use regulation unconstitutional has been that such regulation operates unfairly upon one person:

The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.⁷⁵

Of course, the landowner, as well as other members of the public, benefits from the zoning restriction. But the benefit-sharing would be so disproportionate to the burden the landowner bears as to require a conclusion that such an exercise of police power is unreasonable and violative of due process.⁷⁶

To so burden certain individual landowners beyond their fair share also raises a Fourteenth Amendment equal protection problem. The state is charging one class of society—certain landowners—for a benefit which is to be shared by all of society. Such a classification is related to the legislative purpose of the zoning, and fair compensation through eminent domain would satisfy the equal protection clause. But the exercise of police power works such an unfair distribution of the cost that the classification becomes arbitrary and unreasonable.⁷⁷

⁷³ *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (concurring opinion). There is not a complete dichotomy of views between the courts and legislatures as to the scope of police power regulation. A number of state legislatures have recognized constitutional limitations and have authorized eminent domain proceedings for environmental land use zoning. See, e.g., Conn. Gen. Stat. Ann. § 26-17a (Supp. 1971); N.Y. Conserv. Law § 423 (McKinney 1967); N.C. Gen. Stat. § 113-226(a) (1965). See also Heath, *Estuarine Conservation Legislation in the States*, 5 Land & Water L. Rev. 351 (1970). Representative Paul N. McCloskey of California, an outspoken advocate of environmental protection through land use regulation, has suggested that the entire American system of land use should be overhauled. He would hold sacred no present law, except the Fifth Amendment requirement of just compensation for takings. McCloskey, *supra* note 38, at 1167.

⁷⁴ See, e.g., *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

⁷⁵ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

⁷⁶ See, e.g., *State v. Johnson*, 265 A.2d 711, 716 (Me. 1970).

⁷⁷ Cf. *Hasegawa v. Maui Pineapple Co.*, 52 Hawaii 327, 475 P.2d 679 (1970). The Supreme Court of Hawaii held that a statute which required private employers to reimburse employees for wages lost as a result of jury duty, service on public commissions and the like was a violation of equal protection. The statute worked an invidious class

The mere accident of land ownership in an environmentally vital area should not determine the question of who bears the cost of environmental protection. Eminent domain proceedings assure an equitable distribution of this cost. The landowner's share is the difference between the eminent domain compensation and the profit he might have made through his own ingenuity and sound commercial practice; the public's share is the tax revenue which is used to pay the eminent domain compensation.

B. *Judicial Attempts at Certainty—Legislative Initiative Is Needed*

Courts have labored at distinguishing compensable from non-compensable taking, but they have been able to establish no general theory.⁷⁸ There have been many suggested theories,⁷⁹ but none has been consistently adhered to. The various court rationales have been described as a "crazy-quilt pattern of Supreme Court doctrine"⁸⁰ recognizing no set rules. Furthermore, it has been said that "ambiguity seems to be the rule rather than the exception in these cases."⁸¹ This confusion is traceable to Justice Holmes' pronouncement in *Pennsylvania Coal Co. v. Mahon* that any such distinction is a question of degree.⁸² But even Justice Holmes was inconsistent in adhering to this view in other cases. In *Pennsylvania Coal*, he noted that a strong public desire does not justify shortcuts around the Constitution.⁸³ Yet in *Noble State Bank v. Haskell*,⁸⁴ he stated:

[P]olice power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant

discrimination against employers by requiring them to bear the cost of a public benefit. Id. at —, 475 P.2d at 683.

⁷⁸ See Comment, San Francisco Bay: Regional Regulation for Its Protection and Development, 55 Calif. L. Rev. 728, 735 (1967); Netherton, Implementation of Land Use Policy: Police Power v. Eminent Domain, 3 Land & Water L. Rev. 33, 41 (1968).

⁷⁹ See Sax, *supra* note 48, at 46-61. These theories include the "invasion theory," whereby government lowers property value by regulation and then appropriates the property at much less than its original value—in effect taking the land without compensation. Courts have generally rejected this guise of taking. But see *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), which held that the War Production Board was permitted to close privately owned mines to supply labor for defense work. Compensation was denied since the government never took possession of the mines, even if the effect of the regulation was to put the mines out of business. The "noxious use theory" holds that certain harmful uses of property can be destroyed without compensation. This theory works in simple nuisance situations, but is insufficient for the multitude of cases involving no clear noxious use. The "diminution of value theory" determines where eminent domain should be used by the value that the property has been decreased. This theory has its origin in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). See discussion at p. 793, *supra*.

⁸⁰ Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 Supreme Court Review 63.

⁸¹ Sax, *supra* note 48, at 46.

⁸² 260 U.S. at 413-16.

⁸³ Id. at 416.

⁸⁴ 219 U.S. 104 (1911)

opinion to be greatly and immediately necessary to the public welfare.⁸⁵

The Supreme Court, in *Goldblatt v. Hempstead*,⁸⁶ had an opportunity to resolve the ambiguity. Appellants' sand and gravel operation was prohibited by a town zoning ordinance. The reason for the restriction was that the mining activities below the water table created a twenty-acre lake within a mile of the town's residential area. The lake was considered a hazard to public safety. The Court alluded to the problem of deciding how far a regulation might go before it becomes a taking, but held that there was no need to decide the question in the absence of evidence showing how far appellants' property value was reduced.⁸⁷

The inability of courts to formulate a rule as to exactly when a restrictive zoning regulation becomes a taking leaves legislatures with two alternatives. The first is to use the police power to the brink of its constitutional limits. The problem here is that when these limits are overstepped and inverse condemnation proceedings are instigated, courts must make determinations which are more appropriately in the legislative sphere. Complex environmental policies are beyond the technological sophistication of courts and it is desirable that they not question legislative determinations in this area.⁸⁸ Thus, when a legislature ascertains that environmental protection demands certain restrictions on the use of real property, and that these restrictions should be enforced under the police power, courts should not interfere unless there is no rational relation between the remedy and the purpose of the statute. Leaving the judicial branch solely with the responsibility for determining who is to bear the burden of environmental action is likely to overburden the courts. With a lack of overall policy guidelines from the legislature, judicial policy would have to evolve on a case-by-case analysis.

The second alternative is for legislatures to anticipate the problems and hardships involved and to incorporate fair and equitable solutions into environmental zoning laws. This is the preferable alternative because legislatures are better equipped to weigh priorities and to make the complex technological determinations necessary in environmental protection. Also, this latter alternative avoids burdensome and expensive litigation by anticipating disputes, providing equitable solutions and avoiding the necessity for relying on the courts for answers. The Federal Highway Beautification Act of 1965⁸⁹ is an example of how legislative foresight can eliminate constitutional prob-

⁸⁵ Id. at 111.

⁸⁶ 369 U.S. 590 (1962).

⁸⁷ Id. at 594.

⁸⁸ See 3 Land & Water L. Rev., supra note 78, at 56-57; see also Note, The Role of the Court in Protecting the Environment—A Jurisprudential Analysis, 23 S.C. L. Rev. 93 (1971).

⁸⁹ 23 U.S.C. § 131 (1970).

lems. The Act called for state action in removing billboards, junkyards, and other roadside eyesores. The law anticipated financial hardships and inequities and provided for compensation to individuals whose property was taken.

C. *Financial Considerations*

If environmental land use objectives cannot constitutionally be achieved through exercise of the police power, the only means of attaining them would be to pay for them out of the public treasury. Substantial doubt exists as to the availability of funds for such undertakings.⁹⁰ Potential liability of the states through inverse condemnation proceedings would discourage lawmakers from stiff legislative measures, thus resulting in constitutionally safe but ineffective zoning laws.⁹¹ Representative McCloskey of California, in a discussion concerning the importance of preserving open-space land, accurately stated the problem:

It can properly be said that local governments have the problems while the federal government has the money to solve them. Since the passage of the sixteenth amendment in 1913, the graduated income tax has radically changed the concept of federalism. In order to meet the financial burdens of four major wars, federal income taxes have been progressively increased. Once these taxes have been accepted for war purposes, they have generally been retained even after the return of peace. . . . As a result, the decade of the 1970's began with local governments facing the problems of environmental hazards, but with the federal government having almost a monopoly on the major source of revenue with which to attack these problems—the income derived from a growing gross national product.⁹²

To solve this difficulty, Representative McCloskey proposes a National Land Use Commission, consisting of a chairman and four members, appointed by the President with the consent of the Senate.⁹³ This commission would have power to designate the uses to which particular areas might be put—*i.e.*, development, agriculture or conserva-

⁹⁰ See Comment, *supra* note 78, at 735.

⁹¹ One commentator has noted this effect in zoning relating to highway takings. In highway building programs, legislatures usually establish "set back" areas along the highway where land is regulated to a certain depth. Legislatures will restrict this land use to a much lesser extent if faced with inverse condemnation liability to landowners along the entire length of the highway. Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation*, 1968 *Urban L. Annual* 1, 2.

⁹² McCloskey, *Preservation of America's Open Space: Proposal for a National Land Use Commission*, 68 *Mich. L. Rev.* 1167, 1171 (1970).

⁹³ *Id.* at 1172-74.

tion of open spaces. It would monitor all open space land, and no unauthorized use of the land would be permitted without the commission's approval.

This proposal would involve an enormous data-gathering and indexing problem, and would not be feasible without a large degree of participation and cooperation from state and local governments. If the commission designated a particular use for which an area might be put, and the state or local government were without sufficient funds to facilitate the commission's determination through eminent domain proceedings, the state or local government could obtain these funds from the commission. To finance this program, Representative McCloskey proposes an Urban Development and Conservation Fund from the federal treasury, with an initial outlay of one billion dollars.

While Representative McCloskey's proposal is addressed to conservation of open-space lands, it is readily adaptable to use in the preservation of marshlands and other environmentally threatened areas. In light of federal recognition of the importance of environmental protection, including marshlands and estuarine areas,⁹⁴ the time is ripe for a national environmental land use commission similar to but broader in scope than that proposed by Representative McCloskey. The commission would monitor all environmental land use—open-space, marshland, and others. It would subsidize state and local governments with the necessary funds. Such an undertaking would necessitate a larger administrative organization than Representative McCloskey's five-man commission, but in essence would serve the same function.

The original fund outlay for such a commission would also have to be considerably larger than one billion dollars. These funds would have to come from income taxes, either by increasing them or, preferably, by diverting funds from other priorities. In addition to direct expenditures from tax revenues, other fund raising methods could be utilized. One such source is assessment liens when commission action results in an increase of land value.⁹⁵ These liens would equal seventy-five percent of the increase in value payable upon sale or development of the property.

Another method of raising revenue might be through the issuance of environmental bonds by state or local governments. Investment could be encouraged by tax-exempt interest payments. Or, in the interest of tax equity and efficiency, the federal government could tax the interest on the bonds and subsidize the state and local governments directly with this added revenue. A further possibility would be a federal financing authority for environmental land regulation which would purchase environmental land regulation bonds of state and local

⁹⁴ See Hearings, *supra* note 60, at 29. U.S. Commission on Marine Science, *supra* note 60, ch. I, at 28.

⁹⁵ McCloskey, *supra* note 92, at 1174.

governments, and finance these purchases by issuing its own taxable obligations.⁹⁶

Implementation of the proposal for a national commission, including problems of organization, cooperation with state and local governments and choice of financing methods, would be primarily a task for Congress. Congress has the responsibility to act as soon as possible to protect the environment, and to seek constitutional means to accomplish this task. Legislative procrastination allows environmental conditions to deteriorate to a point where emergency action is called for,⁹⁷ and much more costly and restrictive measures must be employed.⁹⁸

CONCLUSION

It is generally recognized that a comprehensive program of land use regulation is prerequisite to an effective environmental protection program. In numerous cases the courts have recognized environmental protection as a justification for the exercise of a state's police power. Such rationales as the balance-of-interests test, the role-of-government approach, and the public trust doctrine have provided familiar theoretical underpinnings for the application of this power. The Fifth and Fourteenth Amendments to the Constitution, however, place certain limits on the use of the police power. The exact point at which the Constitution forbids takings without compensation and instead requires eminent domain proceedings is difficult to pinpoint. It would seem, however, that total deprivation of commercial land use, as in both *Candlestick* and *Bartlett*, would require compensation. In this regard, the various state legislatures should anticipate the question of police power versus eminent domain to ensure that their respective regulations are constitutional.

The alternative—*i.e.*, waiting for inverse condemnation proceedings to settle the questions on a cumbersome case-by-case basis—not only puts an enormous litigative burden on the courts, but requires them to become involved in technological environmental determinations and to weigh the competing social priorities behind such deci-

⁹⁶ See Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 Harv. L. Rev. 352, 376-79 (1970).

⁹⁷ An excellent example is the famous Santa Barbara oil spill. After this disaster, definitive federal regulations were finally passed on the environmental responsibilities of government lessees in oil, gas, and sulphur operations on the outer continental shelf. 30 C.F.R. §§ 250 et seq. (1971). See also Sax, *supra* note 50, at 474.

⁹⁸ When an emergency situation exists, constitutional requirements of due process are not strictly observed. See, e.g., *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908). In this case, the Supreme Court held that city health inspectors were permitted summarily to destroy contaminated meat without giving the owners notice or opportunity for a judicial determination. The owners of such meat could not complain of a violation of due process because of the imminent danger that putrified meat presents to the public safety. See also *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149, 154 (1952) and Caldwell, *The Ecosystem As a Criterion For Public Land Policy*, 10 Natural Resources J. 203, 214-15 (1970).

sions. Such determinations are certainly more appropriately the responsibility of the legislatures. Use of eminent domain proceedings of course will involve considerable sums of money. It is generally conceded that the states do not have sufficient funds for such programs. Inevitably, then, federal subsidization, either from increased taxation, a rearrangement of spending priorities, or from other revenue raising methods, is essential.

While many questions concerning environmental programs remain unanswered, it appears certain that inaction will lead to worsening environmental conditions, necessitating more drastic and even more expensive remedies. Thus every effort must be made to move quickly, albeit constitutionally, to meet head on the growing threat to our environment.

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